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CT-2023-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* and subsection 74.01(1.1) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

CINEPLEX INC.

Respondent

AFFIDAVIT OF DR. ON AMIR

(AFFIRMED FEBRUARY 5, 2024)

1. My name is On Amir. I am the Wolfe Family Presidential Endowed Chair in Life Sciences, Innovation, and Entrepreneurship, and Professor of Marketing at the Rady School of Management, University of California, San Diego.
2. I have been retained by Borden Ladner Gervais LLP on behalf of Cineplex to provide, within my area of expertise, particularly with regard to consumer behavior, website design interface, and online purchase decision making, an independent expert opinion report for use as evidence, to assist the Competition Tribunal, in respect of matters raised in this proceeding.
3. I attached as Exhibit "A" to this affidavit an addendum.
4. I attached as Exhibit "B" to this affidavit my Acknowledgment of Expert Witness.

Affirmed remotely by On Amir)
 Stated as being located in the City of)
 La Jolla in the State of California, before me)
 At the City of Toronto in the Province of)
 Ontario on February 5, 2024 in accordance)
 with O. Reg. 431/20, Administering Oath)
 or Declaration Remotely)

E-SIGNED by Erin Penney
 on 2024-02-06 00:35:03 GMT

 Commissioner for Taking Affidavits

E-SIGNED by Dr. On Amir
 on 2024-02-06 00:34:32 GMT



 On Amir

E-SIGNED by Erin Penney
on 2024-02-06 00:35:06 GMT

This is Exhibit "A" to the affidavit of On Amir,
affirmed remotely as being located
in the city of La Jolla in the State of California,
before me in the city of Toronto in the Province of Ontario,
on February 5, 2024, in accordance with
O. Reg 431/20, Administering Oath or Declaration Remotely.

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ADDENDUM OF DR. ON AMIR

FEBRUARY 5, 2024

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I. QUALIFICATIONS, CASE BACKGROUND, AND ASSIGNMENT

1. My full background and qualifications were set forth in my expert report in this matter, dated January 12, 2024 (the “Amir Report”).¹ On January 29, 2024, the Commissioner disclosed the expert reply reports of Dr. Vicki Morwitz (the “Morwitz Reply Report”) and Jay Eckert (the “Eckert Reply Report”).²
2. I have been retained by Borden Ladner Gervais LLP on behalf of Cineplex. I have been asked, within my area of expertise, to comment on the additional facts and information contained in the Morwitz and Eckert Reply Reports.
3. A complete list of the documents and data that I rely upon in reaching my conclusions in this Matter is provided in **Appendix A: Materials Reviewed**.
4. The opinions stated in this report are based on the information available to me at the time of writing this report. I reserve the right to amend or supplement my opinions and report, if appropriate, based on any additional information, facts, or in response to opinions or reports of other experts in this Matter.

II. MY CONCLUSIONS ARE UNCHANGED BY THE ARGUMENTS IN THE MORWITZ REPLY REPORT AND THE ECKERT REPLY REPORT.

5. Nothing in the Morwitz Reply Report or the Eckert Reply Report changes my conclusions that: (i) the Cineplex ticket buying experience, as found on the Cineplex Website and Mobile App, reflect user design best practices; (ii) empirically, virtually all consumers did not find the Online Booking Fee misleading, as shown by the *de minimis* number of complaints submitted to the Competition

¹ Affidavit of Dr. On Amir (Affirmed January 12, 2024). *IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; and IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the Competition Act regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the Competition Act* (Competition Tribunal No. CT-2023-003) (Jan. 12, 2024) and Exhibits (Exhibit A, the “Amir Report”). Capitalized terms used herein, but not otherwise defined, have the meanings assigned to them in the Amir Report.

² Affidavit of Dr. Vicki Morwitz (Affirmed January 29, 2024). *IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; and IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the Competition Act regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the Competition Act* (Competition Tribunal No. CT-2023-003) (Jan. 29, 2024) and Exhibits (Exhibit A, the “Morwitz Reply Report”); Affidavit of Jay Eckert (Affirmed January 29, 2024). *IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C34, as amended; and IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the Competition Act regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the Competition Act* (Competition Tribunal No. CT-2023-003) (Jan. 29, 2024) and Exhibits (Exhibit A, the “Eckert Reply Report”).

Bureau; (iii) the Cineplex Consumer Flow clearly shows the Online Booking Fee and allows consumers to self-sort between differently priced ticketing options, enhancing welfare; and (iv) Dr. Morwitz and Mr. Eckert's conclusions are not empirically tested or validated, rendering them unreliable and without a scientific basis.

III. DR. MORWITZ STILL HAS NOT EMPIRICALLY TESTED OR VALIDATED HER HYPOTHESES.

6. Dr. Morwitz still has not empirically tested or validated her various hypotheses. As a result, they remain entirely hypothetical conjectures. Instead of scientifically validating her hypotheses in the Morwitz Reply Report, Dr. Morwitz instead again summarizes various hypotheses from the academic literature and purports to apply those hypotheses to her personal anecdote of browsing the Cineplex Website.
7. As a threshold matter, it is simply unscientific for Dr. Morwitz to claim that “it was unnecessary to empirically test my hypotheses.”³ Without empirical testing, hypotheses remain just that – hypotheticals. For centuries, the foundation of the scientific method has been to generate hypotheses and empirically test those hypotheses.⁴ Dr. Morwitz's contention that her hypotheses can be applied, *regardless of the empirical facts*, is simply unscientific.
8. Dr. Morwitz's approach in this Matter stands in contrast to her academic research. For instance, in her published research on partitioned pricing, Dr. Morwitz and coauthors explicitly follow this scientific approach by first “develop[ing] hypotheses of how consumers react to partitioned prices” and next “test[ing] these hypotheses in two experiments.”⁵ Similarly, in research on drip pricing, Dr. Morwitz and her coauthors present no less than six separate studies to “test ... [their] predictions.”⁶ Dr. Morwitz's failure to follow this approach in evaluating the Cineplex Consumer Flow leaves her simply with a set of hypotheses, as opposed to scientific conclusions.
9. Dr. Morwitz simply asserts that Cineplex practices drip pricing because her personal browsing of the Cineplex Website revealed that result to her.⁷ But, as I detailed in the Amir Report, the presentation of the Online Booking Fee is not consistent, from a scientific perspective, with drip pricing,⁸ as

³ Morwitz Reply Report Section VI.

⁴ “1.3 The Economists' Tool Kit.” *Principles of Economics*. University of Minnesota (2016).

⁵ Morwitz, Vicki G., Eric A. Greenleaf, and Eric J. Johnson. “Divide and Prosper: Consumers' Reactions to Partitioned Prices.” *Journal of Marketing Research* 25.4 (1998): 453-463 at 454.

⁶ Santana, Shelle, Steven K. Dallas, and Vicki G. Morwitz. “Consumer Reactions to Drip Pricing.” *Marketing Science* 39.1 (2020): 188-210.

⁷ Morwitz Reply Report ¶ 33.

⁸ Amir Report ¶ 60.

defined in subsection 74.01(1.1) of the Competition Act,⁹ the proposed FTC rule,¹⁰ or her own definition of that practice, as both the ticket price and the Online Booking Fee are presented simultaneously to consumers. Dr. Morwitz ignores relevant information, including that the ticket price inclusive of the Online Booking Fee is displayed instantly on the bottom floating display when consumers add tickets to their cart, regardless of screen resolution. When consumers click the “Proceed” button, the all-inclusive price is visible next to it, unless the consumer has not added tickets, in which case she cannot proceed to the next page.

10. Both Dr. Morwitz and Mr. Eckert ignore a fundamental feature of the online purchasing process. The CTA “Proceed” button will not permit the consumer to enter into the online purchasing process until at least one ticket type is selected on the ticketing page. This is important because it forces the consumer to see the total online price (excluding taxes) before the consumer can proceed to the next steps in the Consumer Flow. As I noted in my report, the total online price (excluding taxes) is displayed prominently immediately beside the “Proceed” button. This is key to understanding the Consumer Flow because much of the analysis of both Dr. Morwitz and Mr. Eckert focuses on placement of information on the ticketing page, yet they fail to note this important feature. Further, they fail to provide any empirical evidence, or even any literature review, that examines consumer behavior with respect to this lockout feature.
11. Dr. Morwitz’s personal anecdote about browsing the website remains just that, an anecdote. She admits she did no data analysis.¹¹ Simply “observ[ing] the practice”¹² is not sufficient for scientific findings. In statistical parlance, she has an N of 1 and an undefined standard deviation.¹³ One cannot test empirical hypotheses with such a sample.¹⁴
12. Instead of performing an empirical analysis, Dr. Morowitz just reasserts her hypotheses presented in the Morowitz Report. For instance, she claims with no citations or support that information about the

⁹ *Competition Act*, R.S.C. 1985, c. C-34, s 74.01(1.1). Indeed, nowhere in the Morowitz Report or the Morowitz Reply Report does Dr. Morwitz assist or attempt to assist the reader in showing how, from a scientific perspective, the presentation of the ticket price and the Online Booking Fee relate to the language of subsection 74.01(1.1) of the Competition Act.

¹⁰ Federal Trade Commission, 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87.215 Fed. Reg. 67413-24 (Nov. 8, 2022) at 67416. *See also infra* ¶ 23.

¹¹ Morowitz Reply Report ¶ 31.

¹² *Id.* ¶ 31.

¹³ “Standard Deviation.” *National Library of Medicine*. <<https://www.nlm.nih.gov/oet/ed/stats/02-900.html>> (accessed Jan. 31, 2024).

¹⁴ A commonly used “rule-of-thumb” in statistical testing is a sample size of at least “25 or 30” for a sufficiently large sample. *See, e.g.,* Hogg, Robert V., Elliot A. Tanis, and Dale L. Zimmerman. *Probability and Statistical Inference*, 9th ed. Upper Saddle River, New Jersey: Pearson (2015) at 202.

Online Booking Fee is not presented clearly because the dollar amount of the Online Booking Fee only shows once tickets are added to the consumer's cart and because some consumers may have to scroll to view the Online Booking Fee line item.¹⁵ She does not test, however, whether consumers were actually misled or confused by the structure of the Website, or whether consumers had to scroll or not.

13. Further, her unsupported assertions ignore that the total amount of the Online Booking Fee depends on the number of tickets added, and, as such, the price and amount of the Online Booking Fee shows immediately after it can be calculated, which is when consumers have added the desired number of tickets into their cart.¹⁶ As I discussed in my opening report, this is an efficient and streamlined design.¹⁷ Moreover, ticket pricing information is never presented on a page that does not inform consumers that the Online Booking Fee exists and will be applied to qualifying transactions. Dr. Morwitz also ignores that the Online Booking Fee is incorporated into the subtotal, giving the consumer an accurate, all-inclusive price on which to base her decision, regardless of scrolling behavior.
14. Similarly, Dr. Morwitz's unsupported assertion that the CineClub advertisement and Scene+ information on the Website ticketing page is not "enough to inform consumers regarding the presence and amount of the online booking fee"¹⁸ is a testable hypothesis. Dr. Morwitz's personal opinion and "disagree[ment]"¹⁹ on this matter is insufficient to determine whether, empirically, consumers were misled about the Online Booking Fee despite these visual cues.
15. Other instances of simply asserting conclusions without empirical investigation abound. For instance, Dr. Morwitz claims that the Online Booking Fee represents "price obfuscation" or a "shrouded attribute" "that makes it more difficult for consumers to notice or understand" relevant information,²⁰ without analyzing or quantifying whether actual consumers faced additional difficulties in noticing or understanding relevant information due to the Online Booking Fee.
16. Another example is Dr. Morwitz's claims regarding the timer displayed in the Cineplex Consumer Flow, which she claims creates a time pressure that "serve[d] to enhance the effects of partitioned

¹⁵ Morwitz Reply Report ¶¶ 7-12.

¹⁶ I also note that Dr. Morwitz incorrectly states incorrectly that I referenced Figure 4 of my opening report as the point when the dollar amount of the Online Booking Fee first appears. In fact, I referenced Figure 5 as that point. Morwitz Reply Report ¶¶ 7-8; Amir Report ¶ 31.

¹⁷ Amir Report Section V.C.

¹⁸ Morwitz Reply Report ¶ 13.

¹⁹ *Id.* ¶ 13.

²⁰ *Id.* ¶ 34.

and drip pricing[.]”²¹ Dr. Morwitz’s claim that the Cineplex Consumer Flow resulted in consumers facing time pressure is simply irrelevant for the question at hand of whether the Online Booking Fee is drip pricing or not. Moreover, this is yet another instance where Dr. Morwitz attempts to draw hypotheses from distant academic literature without providing any empirical support. As I noted in my report, research on time limits in other domains may lead to conflicting predictions.²² The impact of the presented timer on consumer behavior during the Cineplex Consumer Flow is an empirical question. Dr. Morwitz did not study, quantify, or analyze how any consumers responded to the timer.

17. In her claims regarding time pressure, Dr. Morwitz also failed to incorporate the fact that there are actually multiple timers that appear during the Cineplex Consumer Flow (as I noted in my report).²³ For instance, there is a five-minute timer that appears when a consumer arrives at the ticketing page. While on the ticketing page, that timer can be reset for what appears to be indefinitely. Further, a new five-minute timer appears after the consumer has selected one or more tickets and elected to “Proceed” to the seat selection page. Dr. Morwitz does not analyze the impact of the existence of these multiple timers, or the fact that each individual timer can be reset, on her conclusions.²⁴
18. What Dr. Morwitz ignores in her application of the academic literature to the context of Cineplex’s Online Booking Fee is particularly troubling because a large number of the studies she cites are based on laboratory observation, not the outside world.²⁵ As Drs. Steven Levitt and John List have explained, “human behavior may be sensitive to a variety of factors that systematically vary between the lab and the outside world.”²⁶ As they explain, behavior in the lab is based not just on monetary factors, but at least five additional factors: (i) moral and ethical considerations; (ii) scrutiny of one’s actions by others; (iii) context in which the decision is made; (iv) self-selection of decision-makers;

²¹ *Id.* ¶¶ 102, 136, 149; *see also id.* ¶ 47.

²² Amir Report ¶ 71.

²³ *Id.* ¶ 19.

²⁴ In her description of her engagement with the Cineplex Consumer Flow, Dr. Morwitz appears to have chosen not to reset the timer (ignoring the pop-up request), instead allowing the timer to expire, forcing her to restart her search. Morwitz Report ¶ 120 (“[S]everal times during my search the countdown clock reached zero and I had to restart my search.”).

²⁵ *See, e.g.,* Dhar, Ravi, and Stephen M. Nowlis. “The Effect of Time Pressure on Consumer Choice Deferral.” *Journal of Consumer Research* 25.4 (1999): 369-384; Xia, Lan, and Kent B. Monroe. “Price Partitioning on the Internet.” *Journal of Interactive Marketing* 18.4 (2004): 63-73; Morwitz, Vicki G., Eric A. Greenleaf, and Eric J. Johnson. “Divide and Prosper: Consumers’ Reactions to Partitioned Prices.” *Journal of Marketing Research* 25.4 (1998): 453-463; Payne, John W., James R. Bettman, and Eric J. Johnson. “Adaptive Strategy Selection in Decision Making.” *Journal of Experimental Psychology: Learning, Memory, and Cognition* 14.3 (1988): 534-552; Rasch, Alexander, Miriam Thöne, and Tobias Wenzel. “Drip Pricing and its Regulation: Experimental Evidence.” *Journal of Economic Behavior & Organization* 176 (2020): 353-370; Santana, Shelle, Steven K. Dallas, and Vicki G. Morwitz. “Consumer Reactions to Drip Pricing.” *Marketing Science* 39.1 (2020): 188-210.

²⁶ Levitt, Steven D. and John A. List. “What Do Laboratory Experiments Measuring Social Preferences Reveal About the Real World?” *Journal of Economic Perspectives* 21.2 (2007): 153-174 at 154.

and (v) stakes of the experiment.²⁷ They conclude that “great caution is required when attempting to generalize lab results out of sample: both to other populations and to other situations.”²⁸ To the contrary, Dr. Morwitz is not cautious in her blind application of the academic literature, most of which includes laboratory experiments, to the specific context of consumers facing the Cineplex Consumer Flow.

19. Dr. Morwitz could have easily undertaken an empirical investigation designed to properly evaluate the hypothesis of whether the Online Booking Fee was misleading to Cineplex consumers. One way to empirically investigate this question would have been to run a consumer survey, in which a large enough sample of Website or Mobile App Canadian Cineplex consumers were recruited to purchase tickets via engaging with the Cineplex Consumer Flow. After that engagement, members of the survey sample could be asked a set of questions about whether they discerned the Online Booking Fee or whether they were surprised about the application of the Online Booking Fee. Finally, a statistical analysis could have been performed on those survey responses to empirically quantify the hypothesis that the Online Booking Fee was misleading. Dr. Morwitz did none of these steps.²⁹
20. Dr. Morwitz does make one empirical investigation into actual Cineplex consumers by evaluating a Reddit internet forum thread in which several users complain about the Online Booking Fee.³⁰ As I discuss further below, these complaints are about the existence and size of the Online Booking Fee, *not* that the Online Booking Fee is deceptive. Moreover, the discussion of the Online Booking Fee on a widely used internet forum such as Reddit might indicate that information about the Online Booking Fee was widely spread and available to consumers.

IV. DR. MORWITZ OFFERS A SINGLE VIEWPOINT THAT IS LIKELY BIASED.

21. In both the Morwitz Report and the Morwitz Reply Report, Dr. Morwitz’s claim that Cineplex used partitioned and drip pricing exclusively relies on her own personal experience browsing the Cineplex Website and interacting with the Cineplex Consumer Flow. By relying exclusively on her own personal interaction with the Website, Dr. Morwitz’s approach is biased due to factors including her

²⁷ *Id.*

²⁸ *Id.*

²⁹ I note that this is one of many possible empirical analyses that could have been undertaken in analyzing whether the Online Booking Fee is misleading to consumers. Some other possible analyses include an analysis of complaints (as I reported in the Amir Report) or a difference-in-difference regression analysis that analyzed consumer demand and willingness-to-pay before and after the introduction of the Online Booking Fee.

³⁰ Morwitz Reply Report n. 7.

own personal role as an advocate for tightened drip pricing regulations, knowledge of the hypotheses under study, and several others.

22. Dr. Morwitz claims that her sample of one review of the webpage does not reflect “something idiosyncratic to [her] own method of searching.”³¹ This is incorrect and is *exactly* why empirical analysis is needed. Dr. Morwitz ignores that there are many possible external variables that might have impacted her review, even without her knowing, on that particular day. Those external factors include her personal approach to scrolling on websites, her personal norms and expectations around website design, general mood and environment, and other biases. These factors could affect her consumer experience above and beyond the idiosyncratic factor of screen settings such as zoom, which Dr. Morwitz herself acknowledges can matter.³²
23. One crucial bias that Dr. Morwitz ignores is her role as advocate for stronger laws and rules against drip pricing. As she herself describes, she was an active participant in a White House National Economic Council panel whose intentional design was to “discuss the economic case in support of the [Biden] Administration’s efforts to crack down on junk fees.”³³ Among those proposals, the FTC has begun a process to introduce a rule that appears similar to the one at issue in this Matter that “would give the FTC additional information and enforcement tools to take action and seek penalties against companies adopting unfair and deceptive junk fees.”³⁴ According to the FTC, it proposed addressing the practices of “misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the total cost of any good or service for sale” and “misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the existence of any fees, interest, charges, or other costs that are not reasonably avoidable for any good or service,” among other practices.³⁵ Despite Dr. Morwitz highlighting her

³¹ *Id.* ¶ 35.

³² *Id.* ¶ 35.

³³ “Readout of White House Panel on the Economic Case for the President’s Initiative on Junk Fees.” *Whitehouse.gov* (Mar. 21, 2023). <<https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/readout-of-white-house-panel-on-the-economic-case-for-the-presidents-initiative-on-junk-fees>> (accessed Jan. 31, 2024).

³⁴ “The President’s Initiative on Junk Fees and Related Pricing Practices.” *Whitehouse.gov* (Oct. 26, 2022). <<https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices>> (accessed Jan. 31, 2024).

³⁵ Federal Trade Commission, 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87.215 Fed. Reg. 67413-24 (Nov. 8, 2022) at 67416.

active role as a contributor to policies regulating hidden fees, she does not consider that such a role could very well lead to biases (even if unconsciously) in her evaluation of the Cineplex Website.³⁶

24. Another crucial bias that Dr. Morwitz ignores is that of a researcher participating in her own research. It is well understood that researchers should collect data that is uncontaminated by participant knowledge of the research hypotheses, as doing otherwise could lead to subjects behaving differently than they would have had they not known about the study's goals.³⁷ Such reasoning is why it is common for researchers to employ methods such as "double blinding" to account for potential biases, in which participants are unaware of the hypotheses to be tested and of the treatment and control conditions.³⁸ In relying solely on the single data point of her own experience, Dr. Morwitz's approach violates this fundamental principle of sound research design.

V. DR. MORWITZ AND MR. ECKERT AGREE WITH SEVERAL OF MY CONCLUSIONS.

25. Throughout the Morwitz and Eckert Reply Reports, both Dr. Morwitz and Mr. Eckert agree with several of the conclusions I presented in the Amir Report. I briefly list and discuss these in this section.
26. For one, Dr. Morwitz acknowledges that the academic literature she cites in general, and on partitioned pricing specifically, yields ambiguous and disparate effects depending on setting and specific pricing designs.³⁹ Further, she acknowledges that those studies refer to contexts different than the online movie purchasing experience.⁴⁰
27. Dr. Morwitz again cites several academic studies that report ambiguous effects of drip pricing and partitioned pricing, alongside influences that moderate the impact of those practices on consumer

³⁶ Indeed, nowhere in the Morwitz Report or the Morwitz Reply Report does Dr. Morwitz attempt to assist or attempt to assist the reader in showing how, from a scientific perspective, the presentation of the ticket price and the Online Booking Fee relate to the FTC's proposed rule. *See id.*

³⁷ Giannelli, Paul C., et al. "Reference Guide on Forensic Identification Expertise." *Reference Manual on Scientific Evidence, 3rd ed.* Washington, DC: The National Academies Press (2011): 55-128 at 68, quoting Redmayne, Mike. *Expert Evidence and Criminal Justice.* Oxford University Press (2001) ("To the extent that we are aware of our vulnerability to bias, we may be able to control it. In fact, a feature of good scientific practice is the institution of processes—such as blind testing, the use of precise measurements, standardized procedures, statistical analysis—that control for bias.").

³⁸ Dr. Shari Diamond defines double-blind research to be "research in which the respondent and the interviewer are not given information that will alert them to the anticipated or preferred pattern of response." Diamond, Shari Seidman. "Reference Guide on Survey Research." *Reference Manual on Scientific Evidence, 3rd ed.* Washington, DC: The National Academies Press (2011): 359-424 at 419.

³⁹ Morwitz Reply Report ¶¶ 47, 49-50.

⁴⁰ *Id.* ¶ 53.

behavior. For instance, she still relies on studies stating that the impact of partitioned pricing is mixed and can depend on presentation, being lessened when the surcharge is presented as a dollar amount (as Cineplex does) rather than a percentage, or when the total price is also displayed.⁴¹ Other of her studies mention further moderating influences such as firm reputation,⁴² which Dr. Morwitz admits she has not analyzed or quantified.⁴³

28. Further, consider the article by Thomas Blake and coauthors that Dr. Morwitz cites extensively in her reply.⁴⁴ That study concerns an analysis of pricing for concert tickets. In that study, the authors analyzed the differences between an “upfront-fee” approach in which “the site showed consumers the final price, including fees and taxes, from their very first viewing of ticket inventory”⁴⁵ versus a “back-end-fee” approach in which “fees were shown only *after* consumers had selected a particular ticket and proceeded to the checkout page.”⁴⁶ Notably, and ignored by Dr. Morwitz, Cineplex’s pricing practices on its Website and Mobile App actually look like the control condition of upfront fees, not the back-end fee treatment. Because Cineplex’s presentation resembles the control condition of the upfront fee strategy studied, Dr. Morwitz’s attempts at applying findings related to the treatment condition of a back-end strategy are misleading.
29. Dr. Morwitz’s application of Mary Sullivan’s analysis of hotel resort fees suffers from a similar flaw. That study found that “separating mandatory resort fees from posted room rates without first disclosing the total price is likely to harm consumers” but noted that to eliminate costs to consumers, hotels could “list the components of the total price separately, as long as the total price is the most

⁴¹ Abraham, Ajay T. and Rebecca W. Hamilton. “When Does Partitioned Pricing Lead to More Favorable Consumer Preferences?: Meta-Analytic Evidence.” *Journal of Marketing Research* 55.5 (2018): 686-703 at 686 (“[C]onsumers respond more favorably to partitioned pricing than to all-inclusive pricing when the total price is absent”; “Other research has demonstrated that the effect of partitioned pricing may be less favorable when the surcharge is a dollar amount rather than a percentage”), 687 (“To date, the literature shows a nearly equal number of positive (52%) and negative (48%) effects of partitioned (vs. all-inclusive) pricing on consumer preferences”), 688, 698; Greenleaf, Eric A., et al. “The Price Does Not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing.” *Journal of Consumer Psychology* 26.1 (2016): 105-124 at 111 (listing “Factors that moderate [partitioned pricing’s] impact” including that “[w]hen surcharge presentation is more complex, such as when using percentages of the base price, consumers tend to recall lower total costs, and are more likely to ignore surcharges” and that “[c]haracteristics of consumers can also moderate the impact of [partitioned pricing]”).

⁴² See Cheema, Amar. “Surcharges and Seller Reputation.” *Journal of Consumer Research* 35.1 (2008): 167-177 at 175 (“For instance, Morwitz et al. (1998) suggested that sellers could divide the total price into both a base price and a surcharge and prosper from the increased purchase likelihood associated with a lower base price. The present research suggests that while high-reputation sellers can divide and prosper in this way, low-reputation sellers cannot do so.”).

⁴³ Morwitz Reply Report ¶ 49 (“I cannot know for sure, but assume Cineplex has at least a moderate reputation[.]”).

⁴⁴ See *id.* ¶¶ 53-55.

⁴⁵ Blake, et al. “Price Salience and Product Choice.” *Marketing Science* 40.4 (2021): 619-636 at 620.

⁴⁶ *Id.* (emphasis in original).

prominently disclosed price.”⁴⁷ Given Cineplex’s prominently displayed, all-inclusive subtotal, which is shown directly next to the CTA button on the ticket page, and does not depend on screen resolution or scrolling (because it is always displayed on the floating ribbon), Dr. Morwitz cannot explain how the study findings apply to this Matter.

30. Additionally, Dr. Morwitz does not dispute my analysis of the number and timing of consumer complaints (or rather, general lack thereof) to the Competition Bureau related to this matter.⁴⁸
31. Dr. Morwitz also acknowledges that the ability to view the screen depends on the particulars of each individual user’s settings and preferences in browsing⁴⁹ and that the Online Booking Fee is viewable to users with certain settings.⁵⁰ As I discussed above, she has not investigated or empirically established the settings that Cineplex consumers generally use.
32. Dr. Morwitz agrees with me that self-selection—just as Cineplex provides in its Consumer Flow—in which “consumers ... self-select into the consumption experience they want, and pay the associated price for what they want, is welfare enhancing.”⁵¹ She also agrees with me that consumers “often go through a multi-step decision making process when making a purchase decision,” which in the movie context includes decisions about movie choice, showtime, and viewing experience, and that the information provided by Cineplex to consumers at no cost “will help consumers during different stages of their decision-making process[.]”⁵²
33. In the Eckert Reply Report, Mr. Eckert concedes that website clutter is confusing and that a streamlined consumer experience is a user design best practice.⁵³
34. Finally, I note that neither Dr. Morwitz nor Mr. Eckert respond to my analysis of the Z-Pattern in the Cineplex Website’s Consumer Flow, which found that, according to Mr. Eckert’s own framework, consumers’ attention would be drawn to numerous text features on the Cineplex Website discussing the Online Booking Fee before reaching the CTA button, regardless of the placement of the page fold.⁵⁴

⁴⁷ Sullivan, Mary W. “Economic Analysis of Hotel Resort Fees.” *Bureau of Economics, Federal Trade Commission, Economic Issues* (2017) at 36.

⁴⁸ Morwitz Reply Report ¶ 14.

⁴⁹ *Id.* ¶ 11.

⁵⁰ *Id.* ¶¶ 10, 30.

⁵¹ *Id.* ¶ 20.

⁵² *Id.* ¶ 20.

⁵³ Eckert Reply Report ¶ 21.

⁵⁴ See Amir Report ¶¶ 88-89.

VI. DR. MORWITZ'S CLAIMS ABOUT CONSUMER COMPLAINTS LACK SUPPORT AND ARE CONTRADICTED BY HER OWN ARGUMENTS ELSEWHERE.

35. Dr. Morwitz's claim that consumers that were misled about the Online Booking Fee would not have complained⁵⁵ is empirically unsupported and non-falsifiable, and, as such, does not provide any useful information and is not a sound basis for her conclusions.
36. As mentioned above, Dr. Morwitz's one empirical analysis in the Morwitz Reply Report is of an internet Reddit forum thread that shows that some consumers complained about the Online Booking Fee. However, review of the complaints in that thread makes it clear that the overwhelming majority, if not all, of the complaints were about the *existence* and *amount* of the Online Booking Fee. That is, consumers complained that they had to pay higher prices. What is missing from those complaints is that consumers were *misled*, i.e., expected to pay one price but then were surprised (or only realized after the fact) that Cineplex ticket prices included the Online Booking Fee. In short, the discussion thread does not show that consumers were misled as to the existence of the Online Booking Fee.
37. Moreover, the existence of the Reddit thread provides empirical support that consumers were aware of and discussing the Online Booking Fee in a public, widely read Internet forum, that included consumers who might not yet have visited the Cineplex Website and Mobile App to observe the Online Booking Fee. In other words, Dr. Morwitz has provided additional support that consumers were not *misled* by the Online Booking Fee, as information about it was widely disseminated outside of Cineplex's own Website and Mobile App. Indeed, the Reddit forum on which this post was found (r/PersonalFinanceCanada) has over 1.3 million subscribers and is in the top one percent rank (by size) of Reddit forums.⁵⁶ That this information was widely available to Cineplex consumers and discussed is counter to the notion that the Cineplex Consumer Flow is deceptive or misleading about the Online Booking Fee.
38. Finally, Dr. Morwitz's contention that "the number of complaints is simply not relevant to the question at hand"⁵⁷ is simply incorrect and underscores Dr. Morwitz's failure to empirically validate her hypotheses. It simply cannot be the case that the number of complaints is "not relevant" to this matter. To see why, consider a (hypothetical) world in which the Competition Bureau received thousands and thousands of complaints claiming that the Online Booking Fee was misleading. In

⁵⁵ See Morwitz Reply Report Section III.

⁵⁶ "Cineplex Just Added \$1.50 Booking Fee. How Do You Feel About It?" *Reddit* (2022).

<https://www.reddit.com/r/PersonalFinanceCanada/comments/vhm0g0/cineplex_just_added_150_booking_fee_how_do_you> (accessed Jan. 30, 2024).

⁵⁷ Morwitz Reply Report ¶ 19.

such an event, that would provide empirical evidence that consumers found the Online Booking Fee misleading. Indeed, in such a hypothetical world, I would be highly surprised if Dr. Morwitz did not cite that (hypothetical) fact as support for her conclusions.

39. As an example of the relevance of complaints to hypotheses about consumer deception, consider a matter in which the FTC sued FleetCor Technologies, Inc. for allegedly making deceptive representations in advertising and charging unauthorized and unfair fees for fuel card products.⁵⁸ Dr. Morwitz provided expert testimony in that matter.⁵⁹ In a court order finding for FTC, the court explicitly cited to individual complaints against FleetCor⁶⁰ and indeed noted that “customer complaints are ‘highly probative’ evidence supporting tendency to deceive[.]”⁶¹ I also note that the court cited to empirical surveys of customers in reaching its conclusions.⁶²
40. There are reasons to expect that the noticeable lack of consumer complaints to the Competition Bureau indicates that consumers did not feel misled, cheated, or duped by Cineplex’s pricing presentation. Academic research has shown that consumer complaints are connected to a “difference between expected and experienced service quality,” and a “confirmation/disconfirmation paradigm.”⁶³ In other words, complaining consumers are those who feel that something about the experience was misleading or did not fulfill an initial promise, and have become “dissatisfiers.”⁶⁴ This model of a “disconfirmation of expectations” explains many consumer complaints.⁶⁵ That Cineplex consumers complained not at all before the filing of the Application, and at very low rates thereafter, indicates that Cineplex was successful in fulfilling consumers’ expectations and that there was no disconfirmation of expectations, i.e., consumers were not surprised or misled by the Online Booking Fee. This is consistent with other research that has shown that deceptive and unethical

⁵⁸ Opinion and Order. *Federal Trade Commission v. FleetCor Technologies, Inc., and Ronald Clarke*. (N.D. Ga. No. 1:19-cv-5727-AT) (Aug. 9, 2022) at 3.

⁵⁹ Morwitz Report ¶ 7.

⁶⁰ Opinion and Order. *Federal Trade Commission v. FleetCor Technologies, Inc., and Ronald Clarke*. (N.D. Ga. No. 1:19-cv-5727-AT) (Aug. 9, 2022) at 40-41, 57-58, 70-73, 79-83, n. 23.

⁶¹ *Id.* at 48.

⁶² *Id.* at 72.

⁶³ Schulp, Jan A. “Critical Incidents in Dutch Consumer Press: Why Dissatisfied Customers Complain with Third Parties.” *Service Quality and Management*. Eds. Paul Kunst, Jos Lemmink, and Bernd Stauss. Wiesbaden, Germany: Springer (1999): 111-159 at 115.

⁶⁴ *Id.* at 135-36.

⁶⁵ *Id.* at 146-47, 150.

pricing strategies harm brand reputation, but that firm honesty and transparency can build consumer trust.⁶⁶

41. To the contrary, my analysis of consumer complaints in my opening report showed, empirically, that consumers did not complain to the Competition Bureau in any sizable number, and those that did only did so after the filing of the Application. The *de minimis* number of complaints is directly relevant for the question at hand. Dr. Morwitz cannot merely wave away the noticeable lack of complaints because it does not suit her opinions.

VII. DR. MORWITZ AND MR. ECKERT IGNORE THE TENSION BETWEEN ZOOM LEVEL AND SCROLLING EXPECTATIONS.

42. Both Dr. Morwitz and Mr. Eckert present certain limited scenarios involving low resolution and zoomed-in screens,⁶⁷ which of course ignore that consumers have control over their ability to zoom and scroll.
43. Consumers' norms, expectations, and ability related to scrolling have improved drastically over the past ten to twenty years, as more and more consumers are browsing and shopping online, and as suppliers such as Amazon, Walmart, Target, etc., have become increasingly popular.⁶⁸ This effect was magnified through the COVID-19 pandemic, as home-bound consumers increasingly turned to online sources for purchasing products.⁶⁹ Such increasing familiarity with internet browsing has

⁶⁶ See, e.g., Lee, Jung-Yong and Chang-Hyun Jin. "The Role of Ethical Marketing Issues in Consumer-Brand Relationship." *Sustainability* 11 (2019): 1-21 at 13 ("An unethical pricing strategy has a negative effect on consumer attitude formation, which includes relationship building with a brand."); Kotler, Philip and Kevin Lane Keller. *Marketing Management*, 14th ed. New Jersey: Prentice Hall (2012) at 203 ("A firm is more likely to be seen as trustworthy when it ... [p]rovides full, honest information ... [and] [p]artners with customers to help them learn and help themselves[.]"); Shankar, Venkatesh, Amy K. Smith, and Arvind Rangaswamy. "Customer Satisfaction and Loyalty in Online and Offline Environments." *International Journal of Research in Marketing* 20 (2003): 153-175 at 174 ("The finding that ease of obtaining information has a stronger effect on both overall satisfaction and loyalty online than offline has important implications.").

⁶⁷ See, e.g., Eckert Reply Report ¶¶ 8-13, 17; Morwitz Reply Report ¶¶ 10-12.

⁶⁸ "Canada – eCommerce." *International Trade Administration* (Nov. 4, 2023). <<https://www.trade.gov/country-commercial-guides/canada-ecommerce>> (accessed Feb. 2, 2024) ("In 2022, there were over 27 million eCommerce users in Canada, accounting for 75% of the Canadian population. This number is expected to grow to 77.6% in 2025. ... Canadian consumers increasingly rely upon the Internet to place orders. For the past decade, Internet consumer sales have risen at a far higher rate than traditional retail sales."); Vogels, Emily A. "Millennials Stand Out for Their Technology Use, but Older Generations Also Embrace Digital Life." *Pew Research Center* (Sept. 9, 2019). <<https://www.pewresearch.org/short-reads/2019/09/09/us-generations-technology-use>> (accessed Feb. 2, 2024).

⁶⁹ Shaw, Norman, Brenda Eschenbrenner, and Daniel Baier. "Online Shopping Continuance After COVID-19: A Comparison of Canada, Germany and the United States." *Journal of Retailing and Consumer Services* 69 (2022).

translated into decreased confusion and increased facility with navigation and scrolling of websites, apps, and mobile pages.⁷⁰

44. Further, both experts ignore that, given current consumer norms regarding screens and browsing experiences, it is those users with high zooms and low resolutions who will have the greater norms around needing to scroll. That is, users who regularly browse the internet on their computer or phone with high magnification will have the greatest understanding through their personal experience that such high magnification levels will reduce the amount of information available on their screen at any moment in time. In turn, this would encourage those users to scroll the webpage in search for information “below the fold.”
45. Finally, I note that both Dr. Morwitz and Mr. Eckert could have conducted an empirical study on whether Cineplex consumers scrolled or did not, or they could have evaluated the zoom and resolution settings of actual Cineplex consumers. Neither Dr. Morwitz nor Mr. Eckert performed such an analysis. As such, their conclusions are unsupported.

⁷⁰ Crabb, Michael and Vicki L. Hanson. “Age, Technology Usage, and Cognitive Characteristics in Relation to Perceived Disorientation and Reported Website Ease of Use.” In *ASSETS '14: Proceedings of the 16th International ACM SIGACCESS Conference on Computers & Accessibility* (2014): 193-200 at 197 (“These results suggest that when examining the amount of disorientation that is reported by an individual when carrying out an information retrieval task similar to the ones used in this work, a large amount of variability between participants is down to their confidence in using the technology, and also their perceptual speed levels. ... [W]hen examining how easy users find a website to use, a large amount of variability exists due to user confidence in the technology”); Dorn, Sheri and Keri G. Hobbs. “Debunking the Myth that Technology Is a Barrier for Volunteer Training Delivery.” *The Journal of Extension* 58.1 (2020): 1-12 at 7 (showing strong and statistically significant correlations between use of technology and familiarity and comfort with technology in the measured sample).

Appendix A

Materials Reviewed

Materials Reviewed¹

Documents Filed in the Proceeding

Affidavit of Dr. On Amir (Affirmed January 12, 2024). *IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; and IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the Competition Act regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the Competition Act* (Competition Tribunal No. CT-2023-003) (Jan. 12, 2024).

Affidavit of Dr. Vicki Morwitz (Affirmed January 29, 2024). *IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; and IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the Competition Act regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the Competition Act* (Competition Tribunal No. CT-2023-003) (Jan. 29, 2024).

Affidavit of Jay Eckert (Affirmed January 29, 2024). *IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C34, as amended; and IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the Competition Act regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the Competition Act* (Competition Tribunal No. CT-2023-003) (Jan. 29, 2024).

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¹ In preparing my report, I reviewed the documents listed here along with any items cited or referenced in the body and footnotes of my report.

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<https://www.reddit.com/r/PersonalFinanceCanada/comments/vhm0g0/cineplex_just_added_150_booking_fee_how_do_you> (accessed Jan. 30, 2024).
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E-SIGNED by Erin Penney
on 2024-02-06 00:35:10 GMT

This is Exhibit "B" to the affidavit of On Amir,
affirmed remotely as being located
in the city of La Jolla in the State of California,
before me in the city of Toronto in province of Ontario,
on February 5, 2024, in accordance with
O. Reg 431/20, Administering Oath or Declaration Remotely.

CT-2023-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* and subsection 74.01(1.1) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

CINEPLEX INC.

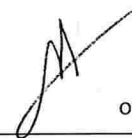
Respondent

ACKNOWLEDGMENT OF EXPERT WITNESS

I, On Amir, acknowledge that I will comply with the Competition Tribunal's code of conduct for expert witnesses which is described below:

1. An expert witness who provides a report for use as evidence has duty to assist the Tribunal impartially on matters relevant to his or her area of expertise.
2. This duty overrides any duty to a party to the proceeding, including to person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

February 5, 2024



E-SIGNED by Dr. On Amir
on 2024-02-06 00:34:39 GMT

Date

On Amir

CT-2023-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* and subsection 74.01(1.1) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

CINEPLEX INC.

Respondent

AFFIDAVIT OF ON AMIR

(AFFIRMED FEBRUARY 5, 2024)
